BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SALUD J. GOMEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,158
ALL STAR BOTTLING	)	
Respondent	)	
AND	)	
	)	
CENTENNIAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal from a preliminary hearing Order for medical treatment entered by Administrative Law Judge Julie A. N. Sample on November 2, 1999.

ISSUES

This case involves a claim for a low back injury that is alleged to have occurred on November 17, 1998. Judge Sample found that although claimant's credibility was somewhat tarnished, claimant proved he injured his back at work in November 1998. Respondent was ordered to provide claimant with a list of three physicians from which claimant could choose an authorized treating physician.

Respondent contends the ALJ erred in finding claimant's condition arose out of and in the course of his employment with respondent. The respondent argues that claimant's back condition preexisted his employment with respondent and/or claimant suffered an intervening back injury with a subsequent employer which would account for his present condition and need for treatment.

Claimant contends that respondent defended this claim at the preliminary hearing before the ALJ only on the basis of whether claimant was in need of medical treatment and, therefore, this appeal does not give rise to a jurisdictional issue and should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

We will first address the issue of the Board's jurisdiction to hear this appeal from a preliminary hearing decision. Claimant submits that this appeal does not give rise to one of the jurisdictional issues contained in K.S.A. 1999 Supp. 44-534a(a)(2) which provides that "a finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board." Claimant argues that the sole issue at preliminary hearing was whether claimant was in need of further treatment. A review of the transcript of the October 18, 1999 proceedings reveals no stipulation to the compensability of the claim. The only agreement noted in that record is that "the claimant is requesting medical treatment with Dr. Robinson at Physicians Associates, Chartered. Dr. Robinson has seen the claimant in the past, and the parties have agreed that should claimant prevail in his request, that he can go back to Dr. Robinson, and Dr. Robinson will be the approved and authorized treating physician."

The October 26, 1999 Transcript of Continued Preliminary Hearing likewise fails to disclose an agreement as to accident arising out of and in the course of employment. Furthermore, the questioning of claimant by counsel for both claimant and respondent reflects that whether claimant's injury preexisted or was aggravated by his subsequent employment were issues. Even Claimant's Motion to Dismiss Respondent's and Insurance Carrier's Application for Review of Preliminary Hearing Decision concedes that "respondent provided cross-examination of Claimant and offered other medical records trying to argue that Claimant had a previous existing condition."

The question of whether claimant's present need for medical treatment is the direct result of his alleged work related injury or is instead due to either his preexisting condition or an intervening injury caused by his work with the subsequent employers gives rise to the jurisdictional issues of whether claimant suffered an accidental injury and whether the injury arose out of and in the course of the claimant's employment with respondent. Accordingly, the Appeals Board has jurisdiction to review the ALJ's preliminary hearing Order.

Finally, claimant's motion to dismiss concludes by stating "there was substantial, competent evidence supporting the Administrative Law Judge's finding." This is not the Board's standard of review. K.S.A. 1999 Supp. 44-555c(a) provides that "the board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." This language has been held to require *de novo* review, the same standard of review exercised by the district courts before the Board was created.

Rios v. Board of Public Utilities of Kansas City, 256 Kan. 184, 883 P.2d 1177 (1994); Helms v. Pendergast, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

We now turn to whether claimant suffered accident arising out of and in the course of his employment with respondent. Mr. Gomez was the only witness to testify. The medical records introduced as exhibits are not particularly helpful as to causation, but claimant did give a consistent history of a work related injury. In November of 1998 Mr. Gomez had been employed by respondent for about five-and-a-half years. He had been working as a line supervisor but sometime shortly before November 17, 1998, he was taken off of his supervisory job and placed in the job of "being a normal employee, just another worker." Mr. Gomez said that this new job was a lot heavier than what he had done before and he ended up hurting his back. On November 17, 1998, he was working on a line that produced gallon jugs of water. Boxes holding six gallon jugs came down the line "very fast". The boxes had to be picked up and stacked about four high, which came up to about chest level. Sometimes they were stacked five high. While doing this work claimant noticed that his back started hurting. He tried to complete his shift but he could not continue working due to the back pain. When he would bend over to place the first box on the pallet it was very hard for him to straighten back up. The supervisor noticed that the line was getting backed up and claimant told his supervisor that he needed to go home because of the pain. Claimant said he told his supervisor that it was either the heavy lifting causing his pain or that he could have made a sudden or wrong movement and thereby injured his back. Claimant denied any prior back problems and denied injuring his back doing any activity other than at All Star Bottling.

The next day claimant could not bend over to put on his socks. He called respondent and was referred to a doctor at Occupational Medicine Associates in Kansas City, Kansas. He was given physical therapy, pain medication and restrictions against heavy work. Claimant returned to work for five or six months. Claimant was upset because he was still required to do heavy lifting and had been taken out of his supervisory position and placed in a laborer job earning less money. The heavy lifting made his back worse and claimant decided to change employment in order to find lighter work.

Claimant has worked for several different employers since leaving All Star Bottling. Although his symptoms persisted, claimant denies injuring himself anywhere else after leaving All Star Bottling. Claimant admits that he did not disclose his back injury on some of his subsequent employment applications because he was afraid that if he did he would not be hired.

Respondent argues claimant is not credible because he denied prior back problems when medical records show a back injury in 1995 while employed by Uniforce and treatment at KU Medical Center in June 1998 for low back complaints. Claimant's explanation for these records is somewhat confusing. First, claimant said that he never had to turn in an accident report for a back injury during the five-and-a-half years he worked for respondent. He said the injury suffered while employed by Uniforce was not

for pain in his lower back. Claimant later denied that the 1995 medical records are his because they refer to a Salud Gomez that was working for Uniforce and claimant said he never worked for that company. Those medical records also mention that the patient had children. Claimant said he did not have any children in 1995. As for the June 1998 treatment, claimant says that was part of the injury he is making claim for in this case.

Respondent also points out that, in addition to not disclosing his back injury, claimant stated on his employment application at Ankmar Doors that the reason he left All Star Bottling was because he had not gotten a raise in pay. Claimant left his job at Ankmar Doors for Fowler Envelope. Claimant also applied for employment at Standard Fruit Company. As a part of that process he underwent a pre-employment physical examination which he passed.

At Standard Fruit claimant's job included lifting different sized bags of potatoes and stacking them on a pallet. Claimant conceded that this work bothered his back. He only worked at Standard Fruit for one week. He next worked for Ankmar Doors where he loaded doors onto carts and pushed the carts to trailers where someone else would load them. This job also caused him to have pain in his back. At the time of his hearing testimony claimant was working at Fowler Envelope making bales of paper. This job involves driving a forklift and the sitting causes pain as well as when he has to bend over.

Additionally, respondent points to the fact that claimant voluntarily discontinued the treatment provided by respondent in support of its argument of a subsequent injury or aggravation. Claimant explained that the physical therapy was not helping and, therefore, he could not justify missing work for treatment that was of no benefit.

Claimant relates the onset of his low back symptoms to his employment with respondent. He voluntarily discontinued treatment in order to continue working. The need to work was also given as claimant's explanation for not being entirely forthright about his ongoing back problems in some of his subsequent job applications. Respondent contends that if claimant was not forthright about his back injury to subsequent employers and was not forthright to the Court about his preexisting condition, then his testimony about being injured at work on November 17, 1998 should not be believed.

The compensability of this claim turns primarily on claimant's credibility. The Board generally gives some deference to an ALJ's assessment of credibility where he/she had the opportunity to view the witnesses testify. Although Judge Sample expressed some concern about claimant's credibility, she nevertheless found the claim compensable and awarded medical benefits based upon that testimony. Respondent voluntarily furnished claimant with medical treatment for a work related injury, initially. Claimant terminated that treatment but testified he remained symptomatic. Claimant further testified that he left his employment with respondent, at least in part, because the work was too strenuous. It appears that the work claimant performed for his subsequent employers was somewhat lighter, although they still involved bending and lifting.

Based upon the record compiled to date, the Board finds claimant's testimony believable and affirms the ALJ's decision to award medical treatment benefits. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim. K.S.A. 1999 Supp. 44-534a(a)(2).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Julie A. N. Sample on November 2, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

c: Donald T. Taylor, Kansas City, KS
Denise E. Tomasic, Kansas City, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director